83-971

FILED
DEC 12 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

In the Matter of John R. Rafter,
Deceased.

ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and
GEORGE B. FARGIS,

Appellees.

On Appeal From the Court of Appeals of
the State of New York

JURISDICTIONAL STATEMENT

ROBERT V. RAFTER,
Attorney for appellant
Post Office Address
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Rye, New York 10580

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THE QUESTIONS PRESENTED[1]

Can the Declaration of Independence be subverted by refusal to afford an evidentiary hearing with respect to newly discovered evidence showing British Government cut off of foreign trade and combining with others to monopolize foreign oil and is CPLR 5015 federally unconstitutional in failing to require a hearing with respect to newly discovered evidence.

1. Including companion case No, 81-1594, Supreme Court of the United States: Does the combined refusal on the part of the FBI, the Department of Justice, the New York City Bar Association and the appellees to divulge the nature of the bar association file so as to defeat appellant's oil monopoly claim against the estate violate Fifth Amendment and Fourteenth Amendment due process and equal protection rights.

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No. ...

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

In the Matter of John R. Rafter,
Deceased.

ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and
GEORGE B. FARGIS,

Appellees.

On Appeal From the Court of Appeals of
the State of New York

JURISDICTIONAL STATEMENT

Appellant, Robert V. Rafter, appeals from the September 15, 1983, order of the Court of Appeals of the State of New York dismissing sua sponte appellant's appeal from the order of the Appellate Division.

OPINIONS BELOW

The decision of the Court of Appeals of the State of New York dismisses without more and is appended at A1. No other opinion was rendered by the Court. Nor was there any opinion rendered in the Appellate Division.

JURISDICTION

The judgment sought to be reviewed was entered September 15, 1983. A Notice of Appeal was timely filed with the Clerk of the Court of Appeals of the State of New York on November30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

THE CONSTITUTIONAL PROVISIONS INVOLVED AND THE STATE LAW UNDER REVIEW

The Constitutional Provisions involved are the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and the Due Process

Clause of the Fourteenth and Fifth Amendments to the Constitution of the United States:

> "...No State shall deny to any person within its jurisdiction the equal protection of the laws."
>
> "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."
>
> "No person shall ... be deprived of life, liberty, or property, without due process of law;..."

And basic to all of the above is The Declaration of Independence of the United States:

> "— We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—"

The Facts submitted by The Declaration such as the cutting off of foreign trade and the obstruction of justice are set forth in the appendix at A 18.

The State Law under review is section 5015 of the Civil Practice Law and Rules of the State of New York, McKinney's Book 7B and this statute is set forth in the appendix at A22.[2]

---

2. The designation A1 refers to the appendix. The designation A-1 refers to the appendix before the Appellate Division. The letter R followed by a number refers to the numbered document in the Record. R9 refers to the remittitur containing brief and appendix A-1 to A-26.

CONCISE STATEMENT OF THE CASE

I Jurisdiction

Jurisdiction seems proper because the Judicial Code requires a final judgment of the highest state court in which review can be had.[3] And when the highest state court has acted, its refusal to take jurisdiction is in effect an affirmance and as such may be the basis of an appeal.[4] It also appears that the Court is not bound by local law as to the finality of a decree.[5] Again, appeal as of right is granted where the state court sustains the validity of a state statute challenged on federal constitutional grounds.[6]

---

3. 28 USC 1257.
4. Gregory v. McVeigh, 23 Wall. 294 (US 1875); Western Union Tel. Co. v. Crovo, 220 US 364 (1911); Matthews v. Howe, 269 US 262 (1925).
5. Holcombe v. McKusick, 20 How. 552 (US 1858); Sparrow v. Strong, 4 Wall. 584 (US 1867).
6. Huffman v. Pursue Ltd., 95 S Ct 1200, 420 US 592, 43 L Ed 2d 482; rehearing denied 95 S Ct 1969, 421 US 97, 44 L Ed 2d 463 (1975).

The validity of CPLR 5015 was challenged on federal constitutional grounds before the Surrogate's Court for the County of Westchester in failing to provide an evidentiary hearing with respect to the newly discovered evidence. The Surrogate denied the application determining without a hearing the sufficiency of the evidence (R 2, A-3 to A-4).

This denial was affirmed without opinion by the Appellate Division (R 7) And the refusal of the highest state court to take jurisdiction (A1) is in effect an affirmance of the validity of the state statute under review and as such may be the basis of an appeal.

II Stage in Proceedings Federal Questions Raised

Because this Jurisdictional Statement is concerned with a renewed motion, it is respectfully submitted that both the original motion papers and the renewed motion papers are before the Court.

At pages 6 through 9 of Jurisdictional Statement No. 81-1594 denial of fourteenth amendment and equal protection rights was first raised in appellant's petition for a writ of mandamus, and then in the order to show cause before the Surrogate's Court, the brief before the Appellate Division, the Notice of Appeal to the Court of Appeals, and the jurisdictional statement before the Court of Appeals and its supplement.

As to the renewed motion, the subject of this Jurisdictional Statement, the supporting affidavit of appellant before the Surrogate's Court sworn to December

3, 1982 states:

> The legal issues ... include application of ... fifth and fourteenth amendment due process and equal protection, and directly involved is the Declaration of Independence ...

At page 2 of appellant's brief before the Appellate Division (R 9):

> (1) The basic issue involved is the federal constitutionality of CPLR 5015 in failing to provide for a hearing with respect to the sufficiencyof newly discovered evidence and the concealment of that evidence by the respondents and others...

In appellant's notice of appeal to the Court of Appeals of the State of New York (R 8):

> ...where there is directly involved the construction of the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States, and appellant appeals from each and every part of said order of the Appellate Division as well as from the whole thereof.

And the Federal Questions are raised before the Court of Appeals for the State of New York in appellant's Jurisdictional Statement (A7) filed under Rule 500.2 of that Court:

> (d)(1) Issues raised and to be raised include the following:
>
> I The federal constitutionality of CPLR 5015 in not providing for an evidentiary hearing.
>
> II The constitutional issues raised upon the original motion.

The Surrogate's Court did not address constitutional issues in denying (R1,2, R9, A-1,A-3) appellant's renewed motion to vacate the estate decree, not did the Appellate Division in its affirmance without opinion (R7). The Court of Appeals for the State of New York dismissed the appeal for lack of jurisdiction (A1,A2) without opinion.

III Statement of Facts[7]

Appellant seeks to vacate an estate decree on the basis of newly discovered evidence — the bar association file — discovered October 5, 1982 (A8). The Surrogate, in denying the renewed motion, states:

> "The present motion presents no new evidence, ..." (R2)

No evidentiary hearing was held. Under the circumstances, where fraud and concealment on the part of the appellees was alleged, it would seem that due process and equal protection would require a hearing be held.[8]

The newly discovered evidence in the dimmest light shows an effort on the part of Anglo-Iranian Oil Co., Ltd. and the bar

7. The facts are also concisely stated at A12 and A13.
8. Clark v. Burkle, 570 F(2) 824 (1978).

association to construct a defamatory file and then to keep it a secret from the appellant lawyer (A19, R6), aided and abetted by the federal government (A20, R6) and the decedent (R6).

Looked at in a somewhat better light, the file shows an effort on the part of AIOC,[9] the decedent and others to cut off foreign trade and to combine with others to monopolize foreign oil — all in violation of the Sherman Act. The basis of appellant's claim against the estate is Sherman Act violation (A11).

IV Significance of Federal Questions Presented

Anglo-Iranian Oil Co.,Ltd. is controlled by the British Government and so is indistinguishable from the British Government.[10] So here we have the British Government coming into the United States of America and cutting off foreign trade, combining with others and

9. Anglo-Iranian Oil Co. Ltd.
10. In Re Investigation of World Arrangements, 13 FRD 280 (US DC, Dist. of Col., 1952) at 291.

obstructing justice. These are precisely the acts that gave rise to the Declaration of Independence (A18).

The questions presented are of the utmost importance because the issue is whether this is the United States of America or the United States of British America.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court should grant plenary consideration of this matter in accordance with Rule 15.1(h) of the Court.

Respectfully submitted,

ROBERT V. RAFTER
Attorney for appellant

APPENDIX

2 Mo. No. 964 SSD 111

In the Matter of John R. Bafter,
Deceased.
Robert V. Bafter,
Appellant,
vs.
Elizabeth R. Higgins, et al.,
Respondents.

Appeal dismissed without costs, by the Court *sua sponte*, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution.

DECISION COURT OF APPEALS SEPTEMBER 15, 1983

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of September A.D. 1983

PRESENT, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

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2 Mo. No. 964 SSD 111
In the Matter of John R. Rafter, Deceased.
Robert V. Rafter,
Appellant,
vs.
Elizabeth R. Higgins, et al.,
Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution.

Joseph W. Bellacosa
Clerk of the Court

Index No. 2 Mo. No. 964 SSD 111

IN THE STATE OF NEW YORK COURT OF APPEALS

- x

In the Matter of John R. Rafter, Deceased.

ROBERT V. RAFTER,
Appellant,

- against -

ELIZABETH R. HIGGINS and GEORGE B. FARGIS,
Appellees.

- x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ROBERT V. RAFTER, the appellant above named, hereby appeals to the Supreme Court of the United States from the September 15, 1983 order of the New York Court of Appeals dismissing the appeal in the above matter. This appeal is taken pursuant to 28 USC 1257(2).

Notice of Appeal filed with the Court of Appeals of the State of New York on November 30, 1983, signed by appellant with address and served upon appellees that day.

Index No. 2 Mo. No. 964 SSD 111

JURISDICTIONAL STATEMENT

COURT OF APPEALS
STATE OF NEW YORK

- x

In the Matter of John R. Rafter, deceased.

ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and GEORGE B. FARGIS,

Respondents.

- x

Jurisdictional Statement Pursuant to Rule 500.2

(a) (1) The title of the case:
In the Matter of John R. Rafter, deceased.
ROBERT V. RAFTER,
Appellant,
- against -
ELIZABETH R. HIGGINS and GEORGE B. FARGIS,
Respondents.

(2) The appeal is taken from the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department.

(3) The Notice of Appeal was served by mail upon respondents on August 3, 1983; the Notice of Appeal was filed with the Clerk of the Surrogate's Court of Westchester County on August 4, 1983.

(4) Appellant was served by mail with the order appealed from on July 27, 1983; no notice of entry has been served.

(5) The name and address of the attorney for respondents is: GEORGE B. FARGIS, 342 Madison Avenue, New York, New York, 10017.

(b) (1) A copy of the dated notice of appeal is appended.

(2) A copy of the order of the Appellate Division entered July 11, 1983, appealed from is appended.

(3) There was no opinion by the Appellate Division.

(4) A copy of the order of the Surrogate's Court, dated February 3, 1983, and reviewed by the Appellate Division is appended.

(5) There are no findings or conclusions upon which the order was entered. There was a decision, A-3 to A-4.

(c) (1) Jurisdiction to entertain the appeal is set forth at Article 6, Section 3, of the New York State Constitution and at CPLR 5601.

This matter stems from a renewed motion to vacate based upon newly discovered evidence and fraud and is related to the original motion before this Court decided October 27, 1981: Mo. No. 1140 SSD 122.

(2) Authority to review the questions of law presented by this appeal is set forth at CPLR 5501(b).

(d) (1) Issues raised and to be raised include the following:

I The federal constitutionality of CPLR 5015 in not providing for an evidentiary hearing.

II The constitutional issues raised upon the original motion.

Respectfully submitted,

ROBERT V. RAFTER,
Attorney for appellant

Form 6

A-19

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 5, 1982

Present—Hon. Francis T. Murphy, Jr. Presiding Justice
Theodore R. Kupferman
David Ross
Arthur Markewich Justices

FILED
OCT 5 - 1982
Appellate Division, Supreme Court
First Department

M-4464

In the Matter of the Application for Disclosure of attorney at law Robert V. Rafter,

Petitioner,

-against-

The Association of the Bar of the City of New York,

Respondent.

An order of this Court having been made on September 11, 1975 (M-2330), granting petitioner's application only to the extent of permitting respondent to divulge to petitioner the complaint lodged with the respondent in 1953,

And the petitioner having moved for reargument of said order so as to direct respondent to divulge to petitioner the complete contents of the sealed file in respondent's custody,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is granted and, upon reargument, respondent is directed to divulge to petitioner the contents of petitioner's sealed file now in respondent's custody and control, including but not limited to the January 1953 complaint.

ENTER:

JOSEPH J. LUCCHI

Clerk.

APPELLATE DIVISION SUPREME COURT OF THE STATE OF NEW YORK
I, Joseph J. Lucchi, Clerk of the Appellate Division of the Supreme Court, do hereby certify that the foregoing is a true and correct transcript thereof entered in said office on OCT 5 1982
IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on OCT 5 1982

Joseph J. Lucchi
Clerk

AFFIDAVIT IN SUPPORT OF MOTION FOR
FOR DISCLOSURE: INDEX NO. 1975 M-2330

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

x - x

In the Matter of the Application :
for Disclosure of attorney at law
ROBERT V. RAFTER, :
petitioner,
- against - :

THE ASSOCIATION OF THE BAR OF THE :
CITY OF NEW YORK,
Respondent. :

x - x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT V. RAFTER, being duly sworn, deposes and says:

He is a citizen of the United States of America, and he is an attorney at law duly admitted to practice before the Supreme Court of the State of New York and the United States District Court for the Southern District of New York.

He makes this affidavit in support of the instant motion for disclosure of the sealed file herein now in the physical custody and control of respondent.

The federal constitutionality of section 90(10)[2] is "drawn in question" because a refusal to disclose upon good cause shown below would be an abuse of discretion and a denial of fourteenth amendment due process and equal protection. The good cause shown is as follows:

Apparently the file is concerned with Anglo-Iranian Oil Co., Ltd. — the subject of investigation[3] in In Re Investigation of World Arrangements With Relation to the Production, Transportation, Refining & Distribution of Petroleum, 13 FRD 280 (U.S. Dist. Ct. District of Columbia, 1952). Bethuel Webster, N.Y.C., for Anglo-Iranian Oil Co., Ltd., also president of the bar association. Webster, Sheffield filed a complaint with respondent February 19, 1953, divulged to petitioner by order[4] of the Court entered September 11, 1975.

2. Judiciary Law of the State of New York, Section 90(10), McKinney's Book 29.
3. Title 15, Section 1-23 violations, United States Code.
4. Copy of orders appended.

The file also contains a complaint dated January 23, 1953, production of which has been denied by the Court.

The file contains a detailed account of the gratuitous defense of petitioner presented by John R. Rafter, deceased, on or about February 24, 1953, without the knowledge, permission or consent of petitioner.

The file contains a letter from respondent to petitioner dated on or about February 21, 1953, never received and apparently intercepted by others. Production of these items has been denied by the Court.

The name of the January 23, 1953, complainant and the entire contents of the file would enable petitioner to establish a common plan or scheme[5] in violation of Title 15 U.S.C. and would provide the evidence necessary to support petitioner's oil monopoly claim against the estate of John R. Rafter.[6]

5. People v. Pacheo, Supreme Court of Colorado En Banc, May 12, 1980, 618 P. 2d 1102.
6. Surrogate's Court of Westchester County, Index No. 2112/ 71

On July 9, 1980, petitioner made application to Hon. EVANS K. BREWSTER[7] for an order to show cause for an order vacating and setting aside the final judgment in said estate for fraud, misrepresentation and other misconduct on the part of the executrix ELIZABETH R. HIGGINS and her attorney GEORGE B. FARGIS in obtaining the judgment and on the further ground of newly discovered evidence and conflict of interest. The fraud alleged is a continuing fraud through concerted concealment on the part of ELIZABETH R. HIGGINS and GEORGE B. FARGIS and others continuing and on-going to the present.

As stated above, petitioner filed a claim against the estate, and the claim was rejected by the executrix and her attorney. Allowance of the claim would militate against the interest of the executrix as a distributee since it would extinguish the

7. Surrogate of Westchester County.

the estate. Petitioner moved to set aside the final decree in the estate on the ground that it was procured by fraud — through concerted concealment on the part of the executrix, her attorney and others, continuing and on-going to date. The motion was denied in the lower court and also on appeal.[8]

Further testimony on the part of the executrix was also denied, though the final sequence in her deposition was:

Mr. RAFTER: And that is all you know about it, Betty?

WITNESS: Oh, no, I know lots more but I haven't told.

Further testimony on the part of her lawyer was denied, though he refused to answer any questions upon the taking of his deposition. Both the executrix and her attorney are fully conversant with decedent's appearance before the

8. December 9, 1980; April 19, 1982.

bar association, mentioned above, and both have refused to talk, as it were.

Petitioner also sought discovery by way of deposition from the Federal Bureau of Investigation and from the bar association in his Freedom of Information/Privacy Act action.[9] Discovery was refused.

It becomes apparent, then, that petitioner's only avenue of disclosure is the present application to this Court for production of the bar association file. It is needed as evidence against the estate, in support of petitioner's claim against the estate, an antitrust claim against Anglo-Iranian Oil Co., Ltd. and others.

It has been said that the primary purpose underlying the imposition of confidentiality on grievance proceedings[10]

9. U.S. Dist. Court, SDNY, Civ. 1131-77.
10. Petition of Colorado Bar Association, 137 Colo. 357, 325 P.2d 932 (1958); People v. Pacheco, supra, at 1103-1104.

is to protect the reputation of an attorney charged. In this case no charges were made, and it would seem that our system of fair procedure and trial would require the disclosure of the complaints.

A second purpose of the rule is to protect the anonymity of complainants who desire that their complaints remain confidential. But the bar association is also required to protect the attorney, and this is important because of reputation, if nothing else. It is federally unconstitutional to use section 90(10) as a cloak for wrongdoing, particularly if the wrongdoing is initiated by and participated in by the bar association.

A third purpose of the rule is to maintain the integrity of pending Grievance Committee investigations. The proceedings here ended at an early stage, and there is no pending investigation.

Petitioner respectfully seeks the names of the complainants and the contents of the file to establish an intent through a common scheme or plan.[11]

Deponent respectfully directs the Court's attention to the Declaration of Independence which provides the basic tenets of the Constitution of the United States with seven signers thereof present at the Constitutional Convention. It would seem that life, liberty, and the pursuit of happiness — the right to enjoy one's vocation to the fullest extent without interference — embrace the practice of law and the free enterprise system. The Declaration of Independence denounces the cut off of foreign trade, combining with others, deprivation of jury trial, and the obstruction of justice.

---

11. People v. Pacheco, supra, at 1104.

It is repectfully submitted that fourteenth amendment due process and equal protection require disclosure of the file to petitioner.

WHEREFORE, it is respectfully submitted that the motion should be granted.

ROBERT V. RAFTER

(Notarial 26th day of August, 1982).

FACTS SUBMITTED BY THE DECLARATION OF INDEPENDENCE:

States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.

He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their Substance.

He has kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:

For quartering large Bodies of Armed Troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all Parts of the World:

For imposing Taxes on us without our Consent:

For depriving us, in many Cases, of the Benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended Offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an arbitrary Government, and enlarging its Boundaries, so as to render it at once an Example and fit Instrument for introducing the same absolute Rule into these Colonies:

For taking away our Charters, abolishing our most valuable

200 EAST 66TH ST.

[redacted] M.

RAFTER, ROBERT V.
~~700 East 40th St.~~
~~New York 21, N.Y.~~

120 Liberty St
NYC
962-0248

DE 10104

CLOSED 4-39

953 Violation - Canon 20 and 28.

20. Newspaper Discussion of Pending Litigation.

Newspaper publications by a lawyer as to pending or anticipated litigation may interefere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

28. Stirring Up Litigation, Directly or Through Agents

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attachés* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

RAFTER, ROBERT V # 4 Frederick P. Haas, Esq

1977 1977
5/10

5/10 AUSA Hibshir of the Civil Division of the USA's Ofc, SDNY, telephd (791-1959) to ask whether JDP hd bn srvd with subpoena by respt in cnctn with a deposition of JDP noticed by respt in mtr of Rafter v. FBI. Mr. Hibshir stated he ws moving to vacate all of the notices of deposition, including JDP's and that if JDP ws srvd with subpoena to notify Mr. Hibshir immediately and he wd move to have it quashed.

DAVIS POLK WARDWELL SUNDERLAND & KIENDL
15 BROAD STREET
NEW YORK 5, N.Y.

December 16, 1952

Gentlemen:

You have asked me to consider the status before American courts of a purchase of oil from the Iranian Government. I think the following conclusions are justified by the decisions of our courts up to this time:

1. Under international law a sovereign state, in this case the State of Iran, has the absolute right to expropriate or nationalize property within its territory. Where the act is that of a recognized government performed by one of its agents, our courts will not inquire into the validity of the act under the municipal law of the expropriating state or under international law.

2. Where the Executive Branch of our Government refuses to recognize the expropriating state or its acts as valid, our courts will follow the decision of the Executive.

3. Absent such disapproval by the Executive, which is to say the State Department, no recovery can be had in American courts against a purchaser of oil from the State of Iran, whether the plaintiff be the Anglo Iranian Oil Co., the British Government or any person claiming under either of them.

The authorities supporting these conclusions are discussed at length in a memorandum heretofore submitted to you.

Yours very truly,

/s/ John W. Davis

Best Copy Available

Rule 5015. Relief from judgment or order

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or
3. fraud, misrepresentation, or other misconduct of an adverse party; or
4. lack of jurisdiction to render the judgment or order; or
5. reversal, modification or vacatur of a prior judgment or order upon which it is based.

(b) On stipulation. The clerk of the court may vacate a default judgment entered pursuant to section 3215 upon the filing with him of a stipulation of consent to such vacatur by the parties personally or by their attorneys.

(c) On application of an administrative judge. An administrative judge, upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses, and where such default judgments have been obtained in a number deemed sufficient by him to justify such action as set forth herein, and upon appropriate notice to counsel for the respective parties, or to the parties themselves, may bring a proceeding to relieve a party or parties from them upon such terms as may be just. The disposition of any proceeding so instituted shall be determined by a judge other than the administrative judge.

(d) Restitution. Where a judgment or order is set aside or vacated, the court may direct and enforce restitution in like manner and subject to the same conditions as where a judgment is reversed or modified on appeal.

As amended Jud.Conf.1972 Proposal No. 7; L.1978, c. 156, § 12.

1978 Amendment. Subd. (c). L. 1978, c. 156, § 12, eff. May 19, 1978, added subd. (c). Subd. (c) derived from former section 217-a of the Judiciary Law. See said section 217-a for notes of decisions and discussion relevant thereto. Former subd. (c) relettered (d).

Subd. (d). L.1978, c. 156, § 12, eff. May 19, 1978, relettered former subd. (c) as (d).

1972 Amendment. Subd. (a). Jud. Conf. 1972 Proposal No. 7, eff. Sept. 1, 1972, in catchline, substituted "On motion" for "Grounds."

Subd. (b). Jud.Conf. 1972 Proposal No. 7, eff. Sept. 1, 1972, added subd. (b). Former subd. (b) relettered (c).

Subd. (c). Jud.Conf. 1972 Proposal No. 7, eff. Sept. 1, 1972, relettered former subd. (b) as (c) and inserted "or vacated" following "is set aside."

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No. 83-971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

In the Matter of John R. Rafter, Deceased,

ROBERT V. RAFTER,

Appellant,

– against –

ELIZABETH R. HIGGINS and
GEORGE B. FARGIS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

GEORGE B. FARGIS
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New York, New York 10173
(212) 682-1170

QUESTION PRESENTED

Whether Rule 500.2 of the New York State Court of Appeals, and that court's *sua sponte* action in dismissing the appellant's appeal to that court is federally unconstitutional, in that the rule does not carry provisions requiring notice or hearing with respect to dismissals *sua sponte*.

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No. 81-1594

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

In the Matter of John R. Rafter, Deceased.

ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and GEORGE B. FARGIS,

Appellee.

On Appeal From the Court of Appeals of the State of New York

MOTION TO DISMISS

Appellees, Elizabeth R. Higgins and

George B. Fargis, respectfully move this Court to dismiss appellant's appeal from the order of the New York State Court of Appeals, dated September 18, 1983on the ground that Rule 500.2 of the New York State Court of Appeals is in keeping with orderly presentation of appellate matters and is not repugnant to the federal Constitution, and under further grounds, that in the absence of a final judgment before this Court, jurisdiction should be denied.

MOTION TO AFFIRM

Alternatively, appellees move for the affirmance of the order of the New York State Court of Appeals, on the grounds that appellant did not petition for a rehearing below and there are adequate nonfederal grounds for the order

of the court below to be sustained.

STATUTE INVOLVED

The involvement here is not a statute but is a rule of the New York State Court of Appeals regarding Jurisdictional Statements required to be filed under Rule 500.2 of said court. Appendix to this motion carries a copy of said Rule 500.2 (AA-1).

STATEMENT

Appellant filed a claim in the Surrogate's Court of Westchester County against the estate of his father, John R. Rafter. The claim was rejected by appellees. Subsequently, appellant moved to set aside the final estate decree, on the purported grounds of fraud and concerted concealment. The Surrogate refused to entertain said application and

same was rejected by order dated December 9, 1980 (not appended).

Appellant then sought mandamus in Supreme Court, Westchester County, to compel the Surrogate to act (A9). There is nothing in the papers before this court showing the end disposition of the mandamus proceedings.

Subsequently, appellant appealed the December 9, 1980 order of the Surrogate to the New York State Supreme Court, Appellate Division, Second Department (not appended).

The Appellate Division sustained the Surrogate by order entered June 1, 1981 (not appended).

Thereafter on or before August 25, 1981 appellant appealed to the New York State Court of Appeals (not appended). His Jurisdictional Statement to the Court

of Appeals (A-4) claimed that the concerted concealment in the Surrogate's Court was a denial of due process and equal protection of the law.

Subject matter was noted for appeal to the Supreme Court of the United States on December 24, 1981, from the order of the New York State Court of Appeals, dated October 27, 1981 (A-3).

The New York Court of Appeals dismissed appellant's appeal to that court sua sponte upon the grounds that appellant's order below in the Appellate Division did not finally determine the proceedings within the constitution of the State of New York (A-2).

Appellant Rafter foundations his appeal to this court on the sole grounds that Rule 500.2 of the Rules of the New York Court of Appeals is unconstitutional, in that appellant was not given

notice or hearing with respect to jurisdictional dismissal sua sponte by said court.[1] (Attached as Appendix AA-1 is a copy of the New York State Court of Appeals Rule 500.2.)

ARGUMENT

The Court of Appeals Rules, are in keeping with the orderly presentation of appellate matters. They are not repugnant to the federal Constitution. The right to seek certiorari in the Supreme Court for the review of a state court

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1. Affixed to appellant's jurisdictional statement (A-14 through A-29) is material concerning matters in the federal court in regard to legal fees. Said material is completely unrelated and immaterial to the appeal to this court from the order of the New York Court of Appeals. It should accordingly be expunged from the statement.

judgment, exists by virtue of federal statute only. There are adequate nonfederal grounds for sustaining the order of the New York Court of Appeals, and in the absence of a final judgment jurisdiction should be denied by this Court.

Additionally, appellant's Jurisdictional Statement is confusing and is no more than a mishmash of legal notions. Completely unconnected is his statement of "The Question Presented" (Pg. i) relating to an oil monopoly claim, and his Jurisdictional Statement (Pg. 1) regarding his attack on the constitutionality of Rule 500.2(f) of the Rules of the New York Court of Appeals.

Appellant's contentions that he was deprived of his rights by the State Court of Appeals application of its Rule 500.2

is wholly without merit. There is a good reason to disregard his attack on this rather clear rule governing jurisdictional administration, particularly in a situation such as this, where the sole issue is the constitutionality of a procedural statute. This reason alone is grounds for dismissal of the appeal.

The Appellant Rafter bases his appeal to this Court on what he states are constitutional provisions involved and the state law under review, the state law under review being 5015 of the Civil Practice Law and Rules of the State of New York. The Court of Appeals Rules are in keeping with the orderly presentation of Appellate matters. They are not repugnant to the Federal Constitution. As stated in the appellee's previous motion to dismiss or affirm, the right to seek certiorari in the

Supreme Court for the review of a state court judgment exists by virtue of federal statute only.

Additionally, the appellant's jurisdictional statement is confusing and is no more than a mish mash of legal notions. Completely unconnected are his statements relating to an oil monopoly claim and his prior jurisdictional statement. There is good reason to disregard his attack on the rules governing jurisdictional administration, particularly in a case as this where the sole issue is the constitutionality of a procedural statute. This reason alone is grounds for dismissal of the appeal.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or the order below affirmed.

Respectfully submitted,

George B. Fargis
(Counsel of Record)
342 Madison Avenue
New York, N.Y. 10173
(212) 682-1170

Attorney for
Elizabeth R. Higgins
and George B. Fargis

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of January, 1984 three copies of the Motion to Dismiss or Affirm were mailed, postage paid, to Robert V. Rafter, Esq., Post Office Box 583, Rye, New York 10580, Counsel for Appellant.

APPENDIX

APPENDIX

PART 500-RULES OF PRACTICE

Section 500.2 Filing and Service of Appellant's Jurisdictional Statement

(a) Within 10 days from the time the appeal is taken, appellant shall file with the clerk one copy of a statement which shall recite:

(1) the title of the case;

(2) the court from which the appeal is taken;

(3) the date of service and filing of the notice of appeal or the date of entry of the order granting leave to appeal;

(4) the date and type of service upon the appellant of the order or judgment appealed from, and its notice of entry; and

(b) There shall be filed with the statement a legible copy of:

(1) the dated notice of appeal, or the order granting leave to appeal;

(2) the order, judgment or determination appealed from;

(3) any other order brought up for review;

(4) the opinion or memorandum of the Appellate Division or other intermediate appellate court;

(5) the order, judgment or determination reviewed by the Appellate Division or other intermediate appellate court; and

(6) the formal or informal findings and conclusions upon which the order, judgment or determination was entered.

(c) The statement must give the constitutional, statutory, case, or other authority supporting the assertion that the court has jurisdiction to entertain the appeal and to review the questions raised. It must include a point heading identification of all issues already raised and likely to be raised, for purposes of subject matter indexing and calendaring; inclusion and identification of issues shall not be binding on counsel for brief writing or oral argument purposes.

(d) The filing of this statement is mandatory in all cases and, simultaneously with the filing, appellant shall serve counsel for all parties with a full set of the papers required by this section.

(e) Where a party will assert that a statute is unconstitutional, notice shall be given to the Attorney General in writing at the time of filing this jurisdictional statement, and a certification of the notification shall be included in this statement. The notification and a copy of the statement under this section must be sent to the attention of the Solicitor General at Albany, New York.

(f) This court may determine, sua sponte, whether it has subject matter jurisdiction and authority to review, based on the papers submitted in accordance with this section and on such other written argumentation as may be sought.